Supreme Court, U.S.
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88-109

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN PROTEIN CORPORATION,

Petitioner,

vs.

AB VOLVO and VOLVO LASTVAGNAR AB, as successors in interest to Beijerinvest AB, BEIJER INDUSTRIES, INC. and BO LYCKE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT L. BEERMAN*
BEERMAN AND WADLER
Attorneys for Petitioner
122 East 42nd Street, Suite 1910
New York, New York 10168
(212) 490-6600

Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE:

DID THE SECOND CIRCUIT HAVE THE POWER TO REVIEW THE SUFFICIENCY OF THE EVIDENCE UNDER FED.R.CIV.P. 50(B) SINCE THE DEFENDANTS FAILED TO MOVE FOR A DIRECTED VERDICT AFTER THE CLOSE OF ALL THE EVIDENCE?

QUESTION TWO:

IN MAKING SUCH A REVIEW DID THE SECOND CIRCUIT USURP THE JURY'S ROLE GUARANTEED BY THE SEVENTH AMENDMENT BY FINDING INSUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT?

The former Chief Judge of the Southern District of California sitting by invitation in the Southern District of New York presided over a jury trial which awarded plaintiff American Protein Corporation ("APC")[1] $3 million in damages. Had this trial been

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1. STATEMENT PURSUANT TO RULE 28.1

Petitioner, American Protein Corporation ("APC") has no parent, subsidiaries, or affiliates.

conducted in the trial judge's own district, an appeal to the Ninth Circuit would have been summarily affirmed. Yet the appeal to the Second Circuit resulted in the judgment being reversed as a matter of law.

This conflict in the circuits involves the interpretation of Fed.R.Civ.P. 50(b) which limits the scope of review of a jury's verdict by trial and appellate courts.

Inconsistent application of Rule 50(b) will defeat the salutary rationale of the Rule which is to warn a party that its proof may be defective before the case is submitted to the jury so that the defect could be timely cured. It may also improperly deprive a party of his right to trial by jury under the Seventh Amendment.

Finally, not only was appellate review improper here, but this review

also disregarded the evidence submitted to the jury and incorrectly construed applicable New York law.

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AMERICAN PROTEIN CORPORATION,

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v.

AB VOLVO and VOLVO LASTVAGNAR AB, as successors in interest to BEIJERINVEST AB, BEIJER INDUSTRIES, INC. and BO LYCKE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

American Protein Corporation, Inc. ("APC") petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit entered in this action on April 8, 1988. No petition for rehearing was filed.

VERDICTS, JUDGMENTS, & OPINIONS BELOW

1. American Protein Corporation v. AB Volvo and Volvo Lastvagnar AB, as successors in interest to Beijerinvest AB, Beijer Industries, Inc. and Bo Lycke, Docket No. 84 Civ. 5096 (S.D.N.Y. 1987), jury verdict entered on May 26, 1987 (finding for APC against defendants in the amount of $3 million (Appendix C).

2. American Protein Corporation v. AB Volvo et al. Docket No. 84 Civ. 5096 (S.D.N.Y 1987), judgment entered June 1, 1987, amended judgment entered June 16, 1987 (computing prejudgment interest) (Appendix B).

3. American Protein Corporation v. AB Volvo et. al. 844 F.2d 56 (2d Cir. 1988) decided April 8, 1988 (reversing trial court's jury verdict and judgment) (the decision appealed from, Appendix A).

BASIS OF JURISDICTION

Jurisdiction of the District Court was pursuant to 28 U.S.C. Section 1332 (a)(i). The Court of Appeals had jurisdiction under 28 U.S.C Section 1291. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (i).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional provision and statute:

Seventh Amendment to the United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. (Emphasis added).

Federal Rules of Civil Procedure, Rule 50(b):

> Motion for judgment notwithstanding the Verdict. Whenever a motion for a directed verdict made at the

close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned, such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. (Emphasis added).

STATEMENT OF THE CASE

After defendants' motion for summary judgment was denied in its entirety (Ward, J.), this action was assigned for trial to Turrentine, J., the former Chief Judge of the Southern District of California, who was sitting by invitation in the Southern District of New York. A jury trial ensued. At the end of APC's case, defendants had moved for a directed verdict. The judge ruled that there was sufficient evidence to go to the jury on the issue of tortious interference.[2] Significantly, defendants made no motion for a directed verdict at the close of all evidence.

The jury awarded APC $3 million in damages (Appendix C) for breach of

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[2] The other aspects of this motion, unrelated to the tortious interference claim, were disposed of after the close of all evidence.

contract, tortious interference with contract and negligent misrepresentation.

On appeal to the Second Circuit, the court reversed as a matter of law and granted judgment to defendants (Appendix A).

The central issue before this Court is the permissible scope of review with respect to the tortious interference claim.[3]

The underlying facts involve a March 1981 contract between APC and Beijer, Inc. ("BI"). BI is bankrupt and not a party here. The corporate defendants were at various times BI's parents which wholly owned BI either directly or indirectly. The individual

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[3] For purposes of this petition, discussion is limited to the tortious interference claim which supports $2.8 million of the jury's verdict.

defendant, Lycke, was president of BI until BI was sold in December 1982. At all relevant times BI had no assets except the funding it received from the corporate defendants. BI's only business related to the APC contract.

Pursuant to the contract, APC provided BI with all its output of a dried blood product for human protein consumption for a three year term. In reliance on this contract, APC had spent $1 million to start operations and refurbish a processing plant in Iowa.

In May 1982, the ultimate parent of BI, Beijerinvest AB (whose successor in interest, Volvo Lastvagnar AB is a defendant in this action) merged with defendant AB Volvo. This was the largest merger in Swedish history and strengthened the position of AB Volvo as the largest company in Sweden.

In October 1982, BI held a Board of Directors meeting in New York attended by the individual defendant Lycke and the other two directors who were the chief executive officer and a senior executive of AB Volvo. As a result of this one hour meeting, the defendants decided not to continue to purchase dried blood products from APC. The defendants' funding of BI then stopped. The two AB Volvo executives each were paid $15,000.00 for this meeting.[4]

Within six weeks, based upon a plan conceived by the defendants, BI was "sold" to a former $50,000 a year employee, Carney, for $1,000 and a $2 million note. Carney lacked the financial ability to repay the note.[5]

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[4] and 5 These facts are omitted from the Second Circuit opinion (Appendix A).

Carney then went to APC and stated that, if APC would not renegotiate the contract, Carney would put BI into bankruptcy. APC refused and BI was put into voluntary bankruptcy.

Thereupon, defendants paid Carney $300,000 for future consulting services and Lycke a $200,000 severance fee.[6]

Focusing on the tortious interference claim, the following significant factors are relevant here:

> 1. The defendants never alleged in their answer or the pretrial order the affirmative defense of justification as required by New York law;
> 2. The issue of justification was raised only after all the evidence had been submitted to the jury; and
> 3. Defendants' case disclosed for the first time at the trial the scheme to "reorganize" BI by literally giving it away and rewarding the individuals involved in bankrupting BI by payments of substantial sums characterized as director fees and severance.

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6. These facts are omitted from the Second Circuit opinion (Appendix A).

POINT I

THE CONFLICTING APPLICATION OF FED.R.CIV.P. 50(B) AMONG THE FEDERAL CIRCUITS HAS LED TO A CONTRAVENTION OF THE PURPOSES OF THE RULE.

The Second Circuit's review and reversal of the jury's verdict on the tortious interference claim in this case highlights the conflict that has developed in the circuits' application of Rule 50(b) and demonstrates a clear contravention of the language and the purposes of the Rule.

This case demonstrates the anomaly that has arisen from the lack of a uniform application of Rule 50(b) throughout the circuits. Had this appeal been heard in the trial judge's home district, on appeal to the Ninth Circuit the verdict would have been summarily affirmed.

The circuits are in admitted conflict concerning whether Rule 50(b)

really means what it says: that a motion for a directed verdict at the close of all the evidence is a prerequisite for a post-trial motion for a judgment n.o.v.[7] Some circuits, while admitting that the Rule is to be strictly applied, have, nevertheless, relieved the moving party of the responsibility of complying with the requirements of Rule 50(b). Federal Savings and Loan Insurance Corp. v. Reeves, 816 F.2d 130, 138 (4th Cir. 1987); Quinn v. Southwest Wood Products, 597 F.2d 1018, 1025-26 (5th Cir. 1979); Pittsburgh-Des Moines Steel v. Brookhaven Manor Water Co., 532 F.2d

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[7] In pertinent part, Rule 50(b) states: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." (Emphasis added).

572, 576 (7th Cir. 1976).

These courts have gone beyond the generally accepted exceptions to the rule[8] and have expanded the circumstances under which a party may move for a judgment n.o.v. even though a prior motion for directed verdict has not been previously made on those same

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[8] The circuits generally agree that the requirement of making a motion for a directed verdict at the close of all the evidence may be satisfied where: (1) an earlier motion for directed verdict was taken under advisement by the trial judge; or (2) where an ambiguous or inartful request or motion was made at the close of evidence which sufficiently approximated a motion for a directed verdict. Karns v. Emerson Electric Co., 817 F.2d 1452, 1456 (10th Cir. 1987); Merwine v. Board of Trustees for State Institutions, 754 F.2d 631, 634-635 (5th Cir. 1985), cert. denied, 474 U.S. 823 (1985); Farley Transportation Co. v. Santa Fe Transportation Co., 786 F.2d 1342, 1346-47 (9th Cir. 1985); Villanueva v. McInnis, 723 F.2d 414, 418 (5th Cir. 1984).

grounds.[9] McKinnon v. City of Berwyn, 750 F.2d 1383, 1389 (7th Cir. 1984); Ebker v. Tan Jay International, 739 F.2d 812, 823-824 (2d Cir. 1984); Ohio-Sealy Mattress Mfg. v. Sealy, Inc., 585 F.2d 821, 825 (7th Cir. 1978), cert. denied, 459 U.S. 943 (1982); Beaumont v. Morgan, 427 F.2d 667, 670 (1st Cir. 1970), cert. denied, 400 U.S. 882 (1970); 5A Moore's Federal Practice, para. 50.08, at 50-77 and 50-79 (2d ed. 1987). The holdings of these circuits requires an analysis of

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[9] To insure proper notice to the non-moving party, not only must a motion for directed verdict have been made, it must have been made on the same grounds as the motion for judgment n.o.v. Gilchrist v. Jim Slemons Imports, 803 F.2d 1488, 1493 (9th Cir. 1986); Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802, 814 (3d Cir. 1984), cert. denied, 477 U.S. 908 (1986); 5A Moore's Federal Practice, para. 50.08, at 50-74 to 50-75 (2d ed.1987). Thus, a prior motion on different grounds cannot serve as a basis for a reviewing court's reexamination of the evidence.

the quantity, nature and substance of evidence presented after plaintiff's case. This case-by-case review reveals the uncertainty inherent in such an approach.[10] The reviewing court must first undertake a painstaking and highly inappropriate subjective review of the strength or weakness of the non-moving party's evidentiary case as a threshold issue in order to determine whether it is even permissible to review the sufficiency of the evidence on appeal.

The Ninth Circuit has recognized the hazards engendered by this approach and has expressly rejected such a case-by-case analysis.

> We regard such a [case-by-case] approach as inviting

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[10] See the discussion in the Second Circuit's opinion approving the significance test, Ebker v. Tan Jay International, 739 F.2d 812, 823-24 (2d Cir. 1984) (Appendix A).

> confusion. It is precisely such a difficult examination that a uniform application of Rule 50(b) is designed to avoid. We decline to adopt an interpretation of Rule 50(b), even assuming the language of the rule would so permit, that requires us to engage in a subjective analysis of the strength or weakness of the evidentiary foundation of one party's case, before we even determine whether we may review the sufficiency of the evidence on appeal.
> Farley Transportation Co. v. Santa Fe Transportation Co., 786 F.2d 1342, 1346 n. 2 (9th Cir. 1985) (emphasis added)[11].

Farley recognizes that only this strict interpretation serves the purposes of Rule 50(b): to protect the

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[11] Farley has been followed by the Ninth Circuit. See Herrington v. Sonoma County, 834 F.2d 1488, 1500 (9th Cir. 1987); Johnson v. Armored Transport of California, Inc., 813 F.2d 1041, 1042-43 (9th Cir. 1987); Lifshitz v. Walter Drake & Sons, Inc., 806 F.2d 1426, 1428 (9th Cir. 1986); Gilchrist v. Jim Slemons Imports, 803 F.2d 1488, 1493 (9th Cir. 1986).

integrity of the jury system[12] and to ensure fundamental fairness for the non-moving party. A motion for judgment n.o.v., absent a prior motion for directed verdict, precludes the non-moving party from having the opportunity to cure any defects in proof. 5A Moore's Federal Practice, para. 50.08, at 50-77 (2d ed. 1987).

A strict application of Rule 50(b), however:

> ... serves the important purpose of alerting the opposing party to the alleged insufficiency of the evidence at a point in the trial where that party may still cure the defect by presenting further evidence.

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[12] To allow a reviewing court to enter a judgment contrary to the jury's verdict where no motion for a directed verdict has been made would permit judicial reexamination of facts already tried by the jury in violation of the Seventh Amendment. (See Point II, infra). Mutual Ben. Health & Accident Ass'n v. Thomas, 123 F.2d 353, 355 (8th Cir. 1941); 5A Moore's Federal Practice, para. 50.08, at 50-76 (2d ed. 1987).

> Failure to renew an earlier motion for a directed verdict may lull the opposing party into believing that the moving party has abandoned any challenge to the sufficiency of the evidence once all of the evidence had been presented. If the moving party is then permitted to make a later attack on the evidence through a motion or judgment notwithstanding the verdict or on appeal, the opposing party may be prejudiced by having lost the opportunity to present additional evidence before the case was submitted to the jury. Farley Transportation Co. v. Santa Fe Transportation Co., 786 F.2d at 1346.

Indeed, it is a longstanding and widely accepted rule that a defendant's introduction of evidence after an unsuccessful motion for a directed verdict after the plaintiff's case "constitutes a waiver of the objection to the sufficiency of the evidence unless the motion is renewed at the time when all the evidence is in." Farley Transportation Co. v. Santa Fe Transportation Co., 786 F.2d 1342, 1345

n. 1 (9th Cir. 1985); see also Young v. Langley, 793 F.2d 792, 794 (6th Cir. 1986), cert. denied 107 S.Ct. 436 (1986); Bohrer v. Hanes Corp., 715 F.2d 213, 216 (5th Cir. 1983), cert. denied, 465 U.S. 1026 (1984); Myers v. Norfolk Livestock Market, 696 F.2d 555, 558 (8th Cir. 1982); Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken, 536 F.2d 9, 11 (3rd Cir. 1976), cert. denied 429 U.S. 966 (1976); 5A Moore's Federal Practice, para. 50.05[1], at 50-43 to 50-44 (2d ed. 1987).

Here, the Second Circuit placed APC in an untenable situation because on appeal it was obviously too late to cure any defect in the proof.[13]

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[13] At the very least, the Second Circuit should have remanded for a new trial to permit APC to cure the court perceived defect in proof. See Williams v. Fenix & Scisson, Inc., 608 F.2d 1205, 1207 (9th Cir. 1979); Sears v. Pauly, 261 F.2d 304, 307 (1st Cir. 1958).

Moreover, by its review and reversal of the jury's tortious interference verdict, the Second Circuit usurped the jury's constitutionally mandated fact-finding function. For even applying the case-by-case analysis adopted by the Second Circuit, it is clear that the evidence presented after the close of APC's case was neither brief, nor inconsequential, nor insignificant. Indeed, APC's tortious interference claim case was significantly strengthened by defendants' case where the scheme to close down BI and insulate the corporate defendants from liability

first became clear.[14]

Thus, the Second Circuit erred when it ruled that Rule 50(b) was not violated, despite the fact that APC was given no notice to present additional evidence on non-justification and malice before the close of all evidence. The court compounded its error by then holding that as a matter of law, insufficient evidence was presented to the jury on these same issues.

In order to achieve this dramatic reversal of a jury verdict, the Second Circuit rendered Rule 50(b) meaningless and defeated the safeguards that it provides.

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[14] See Statement of the Case, pp. 8-9, supra. This additional evidence on defendants' case would also support the position that defendants' failure to make a motion at the time when all evidence was in constituted waiver of the objection to the sufficiency of evidence. Farley Transportation Co. v. Sante Fe Transportation Co., 786 F.2d 1342, 1345 (9th Cir. 1985).

POINT II

THE SECOND CIRCUIT USURPED THE JURY'S ROLE IN VIOLATION OF THE SEVENTH AMENDMENT BY REVERSING THE VERDICT DESPITE AMPLE EVIDENCE PRESENTED IN PLAINTIFF'S FAVOR.

The Seventh Amendment to the United States Constitution has placed the fact-finding function in the hands of the jury.[15] This places a significant limitation on the reviewing power of an appellate court. Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48, 53 n.5 (1954).

If there is sufficient evidence to take the case to the jury, the reviewing court must accept the jury's

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[15] The Seventh Amendment states: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." (Emphasis added).

findings as binding upon it. It may not reweigh the evidence and set aside the jury's verdict merely because the appellate judges would have drawn different inferences or conclusions from the evidence, even if other results might have been more reasonable. Gallick v. Baltimore & Ohio Railroad, 372 U.S. 108, 114-17 (1963); Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 110 (1959).

This, however, is precisely what the Second Circuit undertook to do. In rejecting the jury's verdict on tortious interference, the court concluded: (1) that lack of justification or proof of malice was an element of APC's prima facie case; and (2) that there was no evidence on the record to establish lack of justification or malice in support of

APC's claim. Not only did the court misstate the applicable New York law on this point, it neglected to consider the ample evidence presented to the jury to support the verdict.

(A) Improper Application of the Justification Defense

The Second Circuit relied on Felsen v. Sol Cafe Mfg., 24 N.Y.2d 682, 686 (1969)[16] which provides a justification defense to directors who without malice dishonor contractual obligations in an effort to protect stockholders.[17]

The Second Circuit misapplied New

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[16] In its opinion, the Second Circuit appears to be suggesting that as a matter of law, a director is justified in breaching a contract whenever his company is suffering financial loss. (Appendix A, p. 2556).

[17] This "justification" defense is by no means universally recognized by the courts. An extensive critique of Felsen can be found in Hare v. Family Publications Service, 334 F.Supp. 953, 957 (D. Md. 1971).

York law when it considered the Felsen justification to be an element of APC's prima facie case. This defense is an affirmative defense and must be pleaded and proved by the one relying on it as a defense. It is defendant who has the duty to plead and prove justification as a defense and it is error to charge that the plaintiff has the burden of proving malice or lack of justification. Linton v. Unexcelled Fireworks Co., 124 N.Y. 533, 537-38 (1891); Williams v. Action For A Better Community, Inc., 51 A.D.2d 876 (4th Dep't 1976).

Defendants failed to plead or prove this affirmative defense. Indeed, justification was never even raised before the jury until summation.

(B). Ample Evidence to Support Jury's Verdict of Finding Liability for Tortious Interference.

Even if justification were part of

APC's prima facie case (which it is not), there is ample evidence on the record from which the jury could reasonably have concluded that defendants' interference with the contract was not justified under Felsen.[18] The jury had the opportunity to evaluate the evidence relating to the attitude and behavior of defendants in effecting the BI "reorganization". The Seventh Amendment precludes the appellate court from "second guessing" the jury on this evidence.

The Second Circuit's selective review of the evidence was improper and the jury's verdict should have been upheld.

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[18] See Statement of the Case pp. 8-9, supra particularly the events resulting in the bankrupting of BI and the substantial payments made by the defendants to those participating in this scheme.

CONCLUSION

The stark irreconcilable conflict among the circuits in the standards applied to Rule 50(b) demands resolution by this Court. Absent a uniform application of the requirements of this Rule, the contradictions, inconsistencies and anomalies illustrated by this case will continue.

In the exercise of its power to prescribe general rules of practice and procedures for the federal courts, this Court has the responsibility to insure an uniform interpretation of the Federal Rules of Civil Procedure. This Court should adopt the uniform objective test of the Ninth Circuit in applying Rule 50(b).

Under the Ninth Circuit test and under the record here (regardless of

which test is applied) the jury verdict should be reinstated. The Second Circuit's impermissible and inappropriate review of the sufficiency of the evidence should be reversed.

New York, New York
July 6, 1988

Respectfully submitted,

Robert L. Beerman
BEERMAN & WADLER
122 East 42nd Street
Suite 1910
New York, N.Y. 10168
212-490-6600

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 331—August Term 1987

(Argued December 3, 1987 Decided April 8, 1988)

Docket No. 87-7560

AMERICAN PROTEIN CORPORATION,

Plaintiff-Appellee,

—v.—

AB VOLVO and VOLVO LASTVAGNAR AB, as successors in interest to BEIJERINVEST AB, BEIJER INDUSTRIES, INC. and BO LYCKE,

Defendants-Appellants.

Before:

NEWMAN, CARDAMONE, and PIERCE,

Circuit Judges

Appeal by AB Volvo, Volvo Lastvagnar AB, and Bo Lycke from an amended judgment entered in the United States District Court for the Southern District of New York by Judge Howard B. Turrentine on June 16, 1987 that awarded American Protein Corporation $3 million in damages assessed in varying amounts against the three ap-

pellants for breach of contract, tortious interference with contract, and negligent misrepresentation.

Judgment reversed.

FREDERICK L. WHITMER, Morristown, New Jersey (Dinah H. Bourne, Betsy L. Weiss, Pitney, Hardin, Kipp & Szuch, Morristown, New Jersey, of counsel), *for Appellants AB Volvo, Volvo Lastvagnar AB, and Bo Lycke.*

DANIEL A. POLLACK, New York, New York (Pollack & Kaminsky, New York, New York, of counsel), *for Appellee American Protein Corporation.*

Milton D. Andrews, Washington, D.C. (Lance E. Tunick, D. Bruce Sewell, Charles H. Lockwood, II, General Counsel, John T. Whatley, Assistant General Counsel, Schnader, Harrison, Segal & Lewis, Washington, D.C., of counsel), *filed a brief on behalf of the Automobile Importers of America, Inc. as Amicus Curiae.*

CARDAMONE, *Circuit Judge*:

We are presented on this appeal with the issue of when the contractual default of a subsidiary corporation may be visited upon its parents. The question takes on added importance because the parents are Swedish corporations

without a presence in New York but nonetheless were held liable for the obligations of their New York subsidiary. Legal liability was fastened on one foreign parent in part because the corporate veil between it and its subsidiary was pierced. The primary liability of the parents was based on the fact that two of one parent's officers and directors—also directors of the subsidiary—came to New York and voted at the subsidiary's Board of Directors meeting to "wind down" the subsidiary's affairs, resulting in the subsidiary's default on a contract. Of course, it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts. Here, other facts in addition to interlocking directorates are alleged.

BACKGROUND

A. *Facts*

This diversity case arises from the breach of a contract for the sale of edible dried blood derived from the slaughter of cattle and pork. Plaintiff, American Protein Corporation (American Protein), brought the instant action in the Southern District of New York against the defendants AB Volvo and Volvo Lastvagnar AB (Lastvagnar) (formerly Beijerinvest AB), Beijer Industries, Inc., and Bo Lycke.

American Protein is an Iowa corporation with its principal place of business at Lytton, Iowa. Defendant Volvo is Sweden's largest corporation, with its principal place of business in Gothenburg, Sweden. In May 1982 Volvo acquired Beijerinvest AB and changed its name to Volvo Lastvagnar AB which, operating as a wholly owned sub-

sidiary of Volvo, is located in Stockholm. Lastvagnar (f/k/a Beijerinvest) owns 100 percent of the stock of Beijer, Handel & Industri, a Swedish corporation which owns 100 percent of the stock of defendant Beijer Industries, Inc., a New York corporation. Beijer, Inc.—also a New York corporation—was, in turn, a wholly owned subsidiary of Beijer Industries. Volvo is therefore the parent of all the members of the Beijer family of corporations.

Walter Lauridsen, an agronomist living in Iowa, had for 20 years been interested in utilizing the blood run-off from the slaughter of cattle and pork as a source of protein for humans. Over the years he had developed a concept of spray-drying the blood into a powdered form which, when combined with water, creates a bouillon-like food fit for human consumption. To effectuate his ideas, Mr. Lauridsen organized American Protein. In 1980 he contacted Beijer, Inc. with his idea. The principals of that company expressed interest in his project and invited him to New York City to discuss it further. There he met with defendant Lycke, president of Beijer, Inc., who, according to Lauridsen, told him that Beijer's Swedish parent would back a contract, take all of his output, and use its worldwide marketing capacity to distribute the dried blood product.

Prior to signing a contract Lauridsen asked for a written guarantee from Beijer, Inc.'s (great grand)parent corporation, Beijerinvest, for the performance of Beijer, Inc.'s obligation. Lycke told Lauridsen that no such guarantee could be given. Subsequently, on March 2, 1982 American Protein and Beijer, Inc. entered into a three-year, fixed price, outputs contract for the sale of edible dried blood. The agreement provided practically all of American Protein's business as Beijer, Inc. was to purchase the entire

output of blood products from American Protein's Lytton, Iowa plant. Lauridsen put up his own and borrowed funds—totalling nearly $1 million—to convert an old dairy into a sanitary spray-drying plant capable of producing a product fit for human consumption and made commitments to buy the blood run-off from a slaughterhouse. The March 2d contract forms the basis of the instant action.

About two months after Beijer, Inc. contracted with American Protein—on May 11, 1982—Volvo purchased Beijerinvest and, therefore, the Beijer family of companies. After a number of months of performing the contract—and continuously losing money—Beijer, Inc. ran out of cash and stopped buying and paying for the dried blood product. On October 19, 1982 the Board of Directors of Beijer, Inc. met in New York and discussed the corporation's finances and business prospects. At the same meeting, the status of the dried blood project and Beijer, Inc.'s general marketing efforts were reviewed. As a result, the Board decided not to take on any new business, but instead voted to "wind down" Beijer, Inc.'s activities. All of the members of the Board—Bo Lycke, as Beijer, Inc.'s president; Pehr Gyllenhammar, chief executive officer of Volvo; and Ulf Linden, another high ranking officer of Volvo—were present.

On December 31, 1982 Lycke sold Beijer, Inc. to a company controlled by Lyster Carney, a former employee of Beijer, Inc. for $1,000 plus a $2 million note. Carney, in turn, went to Lauridsen and told him that if he would not renegotiate the blood products contract and take over the marketing function Carney would have to declare bankruptcy. Lauridsen attempted without success to obtain redress in Iowa against Carney's company.

B. *Proceedings Below*

American Protein then sued Volvo, Lastvagnar, and Lycke in the instant action. In a seven count complaint filed in 1984 plaintiff sought recovery of damages from defendants Volvo, Lastvagnar, and Beijer Industries for breach of express written contract (Count I); from Volvo and Lastvagnar for breach of express oral contract (Count II), for breach of implied contract (Count III), for breach of an alleged quasi-contract (Count IV), and for tortious interference with contractual relations (Count V); and from defendant Lycke for fraud (Count VI) and negligent misrepresentation (Count VII).

The case was tried before district court Judge Howard B. Turrentine (formerly Chief Judge for the Southern District of California) and a jury from May 21 to May 26, 1987. At the close of the evidence the trial court dismissed the claim for quasi-contract (Count IV). It also dismissed the contract claims alleged in Counts I, II and III against Volvo. No cross-appeal has been taken by plaintiff from those dismissals. All the other claims were submitted to the jury. The jury returned a $3 million verdict for the plaintiff against Volvo for tortious interference with the contract (Count V), against Lastvagnar for breach of contract (Counts I, II and III) and for tortious interference (Count V), and against Lycke for negligent misrepresentation (Count VII), but not for fraud (Count VI). Beijer Industries, the parent of Beijer, Inc. was charged only in Count I and none of the damages awarded plaintiff were assessed against Beijer Industries. Compensatory damages were awarded plaintiff in the amount of $1 million against Volvo, $1.8 million against Lastvagnar and $200,000 against Lycke.

On May 29, 1987 all defendants moved unsuccessfully for judgment n.o.v. or, in the alternative, for a new trial. A judgment was entered on June 1, 1987 and an amended judgment was entered on June 16, 1987 that computed prejudgment interest in accordance with Iowa law. Defendants appealed this adverse judgment on June 26, 1987.

DISCUSSION

Defendants raise a number of arguments. Volvo and Lastvagnar claim that plaintiff lacked jurisdiction over them and that the evidence does not support the verdict finding them liable for tortious interference with plaintiff's contract; Lastvagnar contends that the issue of piercing the corporate veil should have been decided by the trial court rather than the jury, and that, in any event, there was insufficient evidence to submit this issue to a jury; Lycke claims that he was erroneously found liable for misrepresentation; and, finally, all argue that the damage award lacks a sound basis. Analysis of these issues will be set forth in a discussion of Counts I, II, III, V and VII of the complaint.

I

The first three counts charged defendant Lastvagnar with breach of an express written, an express oral, and an implied contract. Plaintiff's success on these three counts is evidenced by the $1.8 million verdict it obtained against Lastvagnar, the (great grand)parent of the now-defunct Beijer, Inc., the original contracting party. The predicate for success on the express written contract count (Count I) resulted from the trial court's submitting to the jury the question of whether the corporate veil between Beijer, Inc. and Lastvagnar should be pierced.

Lastvagnar's first contention is that piercing the corporate veil, as an equitable remedy, must be decided by the court and not the jury, as occurred in the trial below. Such is not the law. Granted, the relief is equitable in nature, that is, imposing the remedy redresses a wrong by the expedient of ignoring the legal fiction that a corporation's existence is separate from that of its owner. Yet Lastvagnar cites no case to support its position and, in fact, the issue of corporate disregard is generally submitted to the jury. *See, e.g., Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 53 (2d Cir. 1984) (listing appropriate criteria for jury to decide whether corporate veil should be pierced); *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 421 & n.5 (5th Cir. 1980) (collecting cases); *see generally Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958) (jury resolution of disputed question of fact in diversity cases favored). Accordingly, submission of this issue to the jury was not error.

Turning to appellant's second argument, that the evidence on the issue of piercing the corporate veil was insufficient to go to the jury, we begin with several legal propositions. A corporation is an entity that is created by law and endowed with a separate and distinct existence from that of its owners. Because a principal purpose for organizing a corporation is to permit its owners to limit their liability, there is a presumption of separateness between a corporation and its owners, *see, e.g., Crown Cent. Petroleum v. Cosmopolitan Shipping Co.*, 602 F.2d 474, 476 (2d Cir. 1979), which is entitled to substantial weight. Further, disregarding corporate separateness as an equitable remedy is one that differs with the circumstances of each case. *See FMC Fin. Corp.*, 632 F.2d at 422.

Because the arguments in this diversity case are made under New York law, we look to that forum to see when a

parent may be held liable for the acts of its subsidiary. Control is the key. The parent must exercise complete domination "in respect to the transaction attacked" so that the subsidiary had "at the time" no separate will of its own, and such domination must have been used to "commit fraud or wrong" against plaintiff, which proximately caused plaintiff's injury. *Lowendahl v. Baltimore & Ohio R.R.*, 247 A.D. 144, 157 (1st Dept.), *aff'd*, 272 N.Y. 360 (1936), *quoted with approval in Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847, 853 (2d Cir. 1985). To satisfy the control element, American Protein must have demonstrated by a preponderance of the evidence that Beijer, Inc. was controlled and dominated by Lastvagnar with respect to its contract for dried blood to such an extent that it had no separate will of its own or, stated another way, that Beijer, Inc. was a mere instrumentality of its parent. To meet the second element, plaintiff must show that Beijer, Inc. was used by Lastvagnar to commit a fraud or wrong that caused American Protein unjustly to suffer a loss. *See Williams v. McAllister Bros.*, 534 F.2d 19, 21 (2d Cir. 1976).

Factors indicating that a parent corporation controls its subsidiary include lack of normal corporate formality in the subsidiary's existence, under-capitalization, and personal use of the subsidiary's funds by the parent or owner. *See Walter E. Heller & Co.*, 730 F.2d at 53. The record reveals that none of these factors were present in the instant case. Beijer, Inc. maintained its own corporate and financial records, held independent board meetings, and maintained separate corporate offices. While concededly Lastvagnar supplied its subsidiary with working capital from time to time, there is no evidence that Beijer, Inc. received such financing specifically for the dried blood pro-

ject. Nor did Lastvagnar make use of Beijer, Inc.'s corporate funds for its own benefit.

The strongest piece of evidence to support control was the existence of interlocking directorates. This commonplace circumstance of modern business does not furnish such proof of control as will permit a court to pierce the corporate veil. *See Berger v. Columbia Broadcasting Sys.*, 453 F.2d 991, 995 (5th Cir.) (subsidiary's board's being completely comprised of employees of parent is insufficient basis to pierce corporate veil), *cert. denied*, 409 U.S. 848 (1972). Beyond that, American Protein presented no evidence to suggest that Lastvagnar used Beijer, Inc. to commit a fraud or wrong causing American Protein to suffer an unjust loss. Without more reasons to disregard corporate separateness than those shown here, a subsidiary's default may not cast its shadow of liability on its parent. Accordingly, we reverse the verdict against Lastvagnar on Count I.

II

Lastvagnar's liability on Counts II (breach of express oral contract) and III (breach of implied oral contract) was predicated on the theory that Lycke guaranteed to American Protein that Beijerinvest would guarantee Beijer's performance of the contract. Under Count II, Lycke allegedly acted on behalf of Beijerinvest. Under Count III, Beijerinvest's knowledge of Lycke's action created an implied contract without resort to an agency theory. Overlooking the inherent logical contradiction in a finding of liability on *both* of these counts, the evidence was insufficient to establish that Lycke made any guarantee to American Protein. A contrary conclusion cannot stand in light of the facts that Lauridsen requested that Beijerinvest guarantee Beijer, Inc.'s performance and that Lycke informed him

that no such guarantee could be given. The verdict against Lastvagnar on Counts II and III therefore is also reversed.

III

We turn now to Count V, which alleged that Volvo and Lastvagnar tortiously interfered with American Protein's contract with Beijer. The jury found such interference by both parties and awarded plaintiff $1 million against Volvo and, presumably, a portion of the total $1.8 million verdict against Lastvagnar. Before analyzing the merits of this claim, a threshold issue must be considered. American Protein argues that the defendants are not entitled to raise this issue on appeal because they failed to move for a directed verdict at the close of all the evidence pursuant to Fed. R. Civ. P. 50(b).

A. *Compliance With Fed. R. Civ. P. 50(b)*

Rule 50(b) provides "[w]henever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." A motion for judgment n.o.v. after the jury's verdict generally may be made under this Rule only when a motion for a directed verdict has been made at the close of all the evidence and before the case is sent to the jury. *See* Fed. R. Civ. P. 50(b) advisory committee's note. One of the main reasons for the rule, of course, is to give the nonmoving party notice of defects in its proof so that it can cure the deficiencies before the case is submitted.

It is undisputed on this record that defendants made an appropriate motion for a directed verdict of dismissal at the close of the plaintiff's evidence on the same grounds as those later asserted in their judgment n.o.v. motion, in-

cluding the tortious interference ground. After plaintiff rested and defendants made the motion to dismiss, the trial judge reserved decision. Later, it ruled on the motion at the close of all the evidence, specifically denying the motion with regard to the tortious interference claim. When defendants made the judgment n.o.v. motion the experienced district judge stated to defendants' counsel that he "thought" they had "preserved [their] right" to make the postjudgment motion, despite their failure to renew their motion for a directed verdict at the close of all the evidence.

Professor Moore's treatise observes that a postjudgment motion as a general rule may be made even when the moving party has failed to renew a directed verdict motion at the close of all the evidence provided two criteria are met: the trial court indicates it is not necessary to move in order to preserve the right, *and* the nonmoving party's evidence following the unrenewed motion was "brief and inconsequential." *See* 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 50.08 (2d ed. 1987). In *Ebker v. Tan Jay Int'l, Ltd.*, 739 F.2d 812 (2d Cir. 1984), we adopted Professor Moore's first criterion, but reformulated his second one. Instead of evaluating whether evidence subsequent to the unrenewed motion was "brief and inconsequential," the trial court should determine whether the non-moving party could reasonably believe it was safe to rest on its oars. Or, as we put it in *Ebker*, whether the party having notice of a motion directed against the sufficiency of its proof could reasonably believe in light of the proof following the unrenewed motion that it need do nothing further to be free from the risk of judgment n.o.v. *Id.* at 823-24; *see Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, No. 87-7279, slip op. 5905, 5921 n.3 (2d Cir. Nov. 9, 1987). Although in *Ebker* the nonmoving

party did not object to the district court's entertaining the postverdict motion, while here counsel for American Protein vigorously disputed the propriety of the trial court's entertaining defendants' postverdict judgment n.o.v. motion, we believe *Ebker*'s approach appropriate. Since the grounds of the motion were the same as those spelled out in the unrenewed motion for a directed verdict, plaintiff is not prejudiced here by defendants' failure to renew at the close of all the evidence. *Ebker*, 739 F.2d at 824.

Drawing from the trial court's comments, it is plain that the first criterion was met. The *Ebker* approach is particularly appropriate here since the motion for a directed verdict at the end of the plaintiff's case was not denied until the end of all the evidence. It would be a pointless formality to require a defendant at that point to renew the motion. We think the second criteria as amended by *Ebker* has also been satisfied. American Protein had notice after it rested that defendants believed its proof on the tortious interference count deficient. Detailed arguments on appellants' motion at the close of plaintiff's case were entertained and decision was reserved by the trial court. Defendants' evidence in no way strengthened plaintiff's case. More importantly, American Protein claimed neither that it would have nor that it could have presented any additional evidence to compensate for deficiencies in its proof. As a consequence, defendants' right to make a postjudgment motion was preserved.

B. *Merits of Jurisdiction/Tortious Interference*

1. *Jurisdiction*: Having hurdled the procedural obstacle, we now turn to the substance of the jurisdiction/tortious interference issue. We consider jurisdiction first. Jurisdiction over Volvo must be established by American Protein by a preponderance of the evidence. In this diver-

sity case New York provides the applicable law. *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 223 (2d Cir. 1963) (en banc). Jurisdiction apparently was based on N.Y. Civ. Prac. L. & R. 302(a)(2) (McKinney 1972), which provides that a New York court may exercise jurisdiction over any nondomiciliary who in person or through an agent "commits a tortious act within the state." The jury found that Volvo committed a tortious act within New York when its two executives attended the October Beijer, Inc. Board of Directors meeting in New York City and at that meeting ordered its subsidiary to "wind down" its affairs. Beijer, Inc. then breached the contract with plaintiff, allegedly with Volvo's approval, constituting a tortious interference by Volvo and Lastvagnar with performance of Beijer, Inc.'s contract with American Protein. Jurisdiction is thus intertwined with the merits of Volvo's liability. *See United States v. Montreal Trust Co.*, 358 F.2d 239, 242 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966). Volvo argues that its executives who were also Beijer, Inc. directors were merely performing their duties as corporate fiduciaries and that their actions were justified under New York law.

These contentions frame two issues: (1) did the decision of the Volvo executives to "wind down" the affairs of Beijer, Inc. constitute tortious interference with American Protein's contract, and (2) if so, are the actions of these executives attributable to Volvo or did they act solely in their capacities as directors of Beijer, Inc.? Since, as will appear, we conclude that no tortious interference occurred, we need not consider the somewhat metaphysical question of whether a person serving as director of both a subsidiary and a parent corporation can subject the parent to liability by voting at a meeting of the subsidiary's board.

2. *Tortious Interference*: Turning to the merits of the tortious interference claim, we must apply New York conflicts law in this diversity action, *see Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), which holds that the law of the forum with the most paramount interest in the application of its law should be selected, *see Knieriemen v. Bache Halsey Stuart Shields Inc.*, 74 A.D.2d 290, 293 (1st Dep't), *appeal dismissed*, 50 N.Y.2d 1021 (1980). This forum clearly is New York, as the acts constituting the alleged tort occurred in New York and a New York corporation (Beijer, Inc.) was implicated. Accordingly, the trial court properly applied New York law to the tortious interference claim.

The law of New York provides an applicable rule when a possible conflict arises between a director's duty to honor corporate contractual obligations and simultaneously to protect the stockholders' best interests. In such an event, directors of parent companies are released from liability for the contract's dishonor when it results from an effort to protect stockholders, absent a malicious motive. *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 686 (1969). In *Felsen* the New York Court of Appeals—reversing a judgment on a claim similar to the instant one—explained that the plaintiff could not recover unless it established that the defendant's actions were "motivated by malice toward the plaintiff rather than by the preservation of its own economic interest . . . ." *Id.* at 686-87. In adopting that proposition, the court continued, an individual with an economic stake in the business of another may interfere with a contract that the other business has with a third person if the purpose is to protect the individual's own stake. In other words, terminating a corporate contract in furtherance of an equally important right to act in its own

economic interests justifies what would otherwise be actionable. *Id.* at 687.

There is no evidence on the record before us of malice toward American Protein on the part of either Volvo or Lastvagnar. Plaintiff failed to establish a *prima facie* case of tortious interference with contractual relations because the evidence showed only that Volvo executives on the board of Beijer, Inc. endorsed terminating Beijer, Inc.'s contract with plaintiff for the legitimate business reason that it was losing money. Consequently, the verdicts against Volvo and Lastvagnar for tortious interference with a contractual relationship under Count V of plaintiff's complaint must fail as a matter of law. Those verdicts are reversed.

IV

We consider finally Counts VI and VII of the complaint, which charged Lycke with fraud and negligent misrepresentation. The jury exonerated Lycke of fraud, but awarded American Protein $200,000 for negligent misrepresentation.

Here the alleged misrepresentations submitted for the jury's assessment by the trial court—unfortunately not in interrogatory form—were as follows:

> (1) Beijer, Inc. was a division of a worldwide network of companies operated by Beijerinvest and that Beijerinvest funded the projects undertaken by these companies;
>
> (2) Beijerinvest intended to fund the project and to insure Beijer, Inc. satisfied its obligations under the blood products contract;
>
> (3) Beijer, Inc. had wide experience in marketing food products;

(4) Beijer, Inc. would be able to market all of American Protein's projected output under the blood products contract for three years; and

(5) Beijerinvest's other food companies in Sweden could alone absorb one-third of American Protein's projected output under the blood products contract.

Under New York conflicts law, a court must apply the substantive tort law of the state having the most significant relationship with the occurrence and with the parties. *Babcock v. Jackson*, 12 N.Y.2d 473, 482 (1963); *see Machleder v. Diaz*, 801 F.2d 46, 51 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1294 (1987). Given that Lycke is president of a New York corporation and that many of the alleged misrepresentations originated in New York, we conclude that New York law applies. The law of negligent misrepresentation, as enunciated in New York, recognizes that "generally there is no liability for words negligently spoken" but that "there is an exception when the parties' relationship suggests a closer degree of trust and reliance than that of the ordinary buyer and seller." *Coolite Corp. v. American Cyanamid Co.*, 52 A.D.2d 486, 384 N.Y.S.2d 808, 811 (lst Dep't 1976). The speaker must be "bound by some relation of duty, arising out of contract or otherwise." *White v. Guarente*, 43 N.Y.2d 356, 363, 401 N.Y.S.2d 474, 478 (1977). *See Mallis v. Bankers Trust Co.*, 615 F.2d 68, 81-82 (2d Cir. 1980), *cert. denied*, 449 U.S. 1123 (1981). If in the course of contract negotiations an employee of one party makes a fraudulent misrepresentation, of course a fraud claim is available, but here the jury rejected APC's fraud claim. In the absence of fraud and in the absence of a special relationship giving rise to a duty, it is up to the party hearing words he deems important to make them part of the contract.

Even assuming that the statements set out above were negligently spoken, no cause of action exists under the facts of the instant case. APC fails to allege that there was a special relationship between it and Beijer, Inc. before the contract was signed. Rather, APC took the risk that all contracting parties face: that the other party to the contract might end up in bankruptcy. Since APC alleges nothing more than ordinary arm's length negotiations, its negligent misrepresentation claim fails as a matter of law. Accordingly, the jury award on Count VII of the complaint must be reversed.

Finally, our resolution of the counts above obviates the need for addressing appellants' argument that the jury's overall damage award was inconsistent.

CONCLUSION

In sum, the verdict against Lastvagnar on Count I on a theory of piercing the corporate veil, and on Counts II and III is reversed. The verdict against Volvo and Lastvagnar for tortious interference with plaintiff's contract with Beijer, Inc. under Count V is reversed. The verdict against Lycke for negligent misrepresentation under Count VII is also reversed.

Judgment reversed.

APPENDIX B

United States District Court
Southern District of New York

American Protein Corporation

v.

Volvo AB, as successor in interest to Beijerinvest AB, Beijer Industries, Inc. and Bo Lycke

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84 Civ. 5096(HBT)

May 26, 1987

Howard B. Turrentine, U.S.D.J.

A Jury Trial before the Honorable Howard B. Turrentine, U.S.D.J. having begun on May 20, 1987, and during the trial the Court having granted AB Volvo's motion to dismiss counts 1,2,3 and 4; and at the conclusion of the trial the jury having answered the attached interrogatories, and the jury in so doing having returned a verdict in favor of the plaintiff as against the defendant A.B. Volvo in the sum of $1,000,000.00; and the jury having

further found in favor of the plaintiff as against the defendant Volvo Lastvagner AB in the sum of $1,800,000.00; and the jury having further found in favor of the plaintiff as against the defendant Bo Lycke in the sum of $200,000.00, it its,

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgement as against the defendant A.B. Volvo in the sum of $1,000,000.00, and it is further,

ORDERED: That the plaintiff have judgement as against the defendant Volvo Lastvagner A.B. successor in interest to Beijerinvest in the sum of $1,800,000.00, and it is further,

ORDERED: That the plaintiff have judgement as against the defendant Bo Lycke in the sum of $200,000.00, and it is further,

ORDERED: That plaintiff is entitled to interest from the defendants as

provided by law from and after December 1, 1981.

DATED: NEW YORK, N.Y.
May 29, 1987

/s/
Raymond F. Burghardt-
Clerk

APPROVED:

/s/
Howard B. Turrentine
U.S.D.J.

United States District Court
Southern District of New York

American Protein Corp.

v.

Volvo AB, as successor in interest to Beijerinvest AB, Beijer Industries, Inc. and Bo Lycke

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84 Civ. 5096(HBT)

May 26, 1987

Howard B. Turrentine, U.S.D.J.

A jury trial before the Honorable Howard B. Turrentine, U.S.D.J. having begun on May 20, 1987, and during the trial the court having granted AB Volvo's motion to dismiss counts 1, 2, 3 and 4; and at the conclusion of the trial the jury having answered the attached interrogatories, and the jury in so doing having returned a verdict in favor of the plaintiff as against the defendant A.B. Volvo in the sum of $1,000,000.00; and the jury having

further found in favor of the plaintiff as against the defendant Volvo Lastvagner AB in the sum of $1,800,000.00; and the jury having further found in favor of the plaintiff as against the defendant Bo Lycke in the sum of $200,000.00, and the court having expressly determined in accordance with Rule 54(b) that there is no just reason for delay in the entry of final judgement as to plaintiff's claims against defendants, and, further having expressly directed entry of final judgement, it is

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgement as against the defendant A.B. Volvo in the sum of $1,000,000.00, together with pre-judgement interest thereon (in accordance with the law of the State of Iowa) in the sum of $288,218.54 and costs in the sum of $800.00, for a grand total of $1,289,018.54, and it is further

ORDERED: That the plaintiff have judgement as against the defendant Volvo Lastvagner A.B., successor-in-interest to Beijerinvest, in the sum of $1,800,000.00, together with prejudgement interest thereon (in accordance with the law of the State of Iowa) in the sum of $518,793.38 and costs in the sum of $1,440.00, for a grand total of $2,320,233.38, and it is further

ORDERED: That the plaintiff have judgement as against the defendant Bo Lycke in the sum of $200,000.00, together with pre-judgement interest thereon (in accordance with the law of the State of Iowa) in the sum of $57,643.71 and costs in the sum of $160.00, for a grand total of $257,803.71.

ORDERED: That this Amended Judgement supersedes, in all respects, the judgement dated and filed herein

May 29, 1987, which shall be vacated upon entry of this Amended Judgement.

DATED: June 10, 1987.

/s/

Howard B. Turrentine, Senior
Judge, United States
District Court

Submitted by:

Pollack & Kaminsky

By: _____

Attorneys for the Plaintiff
61 Broadway (Suite 2500)
New York, New York 10006
(212) 952-0330

Consented to as to form:

Pitney, Hardin, Kipp & Szuch

By: _____

Attorneys for Defendants
AB Volvo and Volvo Lastvagner, A.B. (previously known as Beijerinvest, Inc.)
163 Madison Avenue (CN 1945)
Morristown, New Jersey 07960
(201) 267-3333

Mailman & Gigante

By: _____

Attorneys for Defendant
Bo Lycke
780 Third Avenue
New York, New York 10017
(212) 832-7400

APPENDIX C

United States District Court
Southern District of New York

American Protein Corporation

v.

AB Volvo and Volvo Lastvagner AB, as successors in interest to Beijerinvest AB, Beijer Industries, Inc. and Bo Lycke

---

84 Civ. 5096 (HWT)

May 26, 1987

Howard B. Turrentine, U.S.D.J.

We, the Jury, find as follows on the claims in this action:

CLAIM ONE

(BREACH OF CONTRACT)

For Plaintiff-----

1. Against Defendant Volvo Lastvagner A.B., successor in interest to Beijerinvest:

Yes x No_____

CLAIM TWO

(BREACH OF EXPRESS ORAL CONTRACT)

For Plaintiff-----

1. Against Defendant Volvo Lastvagner A.B., successor in interest to Beijerinvest:

Yes__x__ No_____

CLAIM THREE

(BREACH OF IMPLIED CONTRACT)

For Plaintiff-----

1. Against Defendant Volvo Lastvagner A.B., successor in interest to Beijerinvest:

Yes__x__ No_____

CLAIM FIVE

(INTERFERENCE WITH CONTRACT)

For Plaintiff-----

1. Against Defendant A.B. Volvo

Yes__x__ No_____

2. Against Defendant Volvo Lastvagner A.B., successor in interest to Beijerinvest:

Yes__x__ No_____

CLAIM SIX

(FRAUD)

For Plaintiff-----

1. Against Defendant Bo Lycke:

Yes_____ No__x__

CLAIM SEVEN

(NEGLIGENT MISREPRESENTATION)

For Plaintiff-----

1. Against Defendant Bo Lycke:

Yes x No_____

AMOUNT OF DAMAGES

For Plaintiff

1. Against Defendant A.B. Volvo:

A. Compensatory damages

1 million dollars

2. Against Defendant Volvo Lastvagner A.B. 'successor in interest to Beijerinvest:

A. Compensatory damages

1.8 million dollars

3. Against Defendant Bo Lycke:

A. Compensatory damages

Two Hundred Thousand
Dollars

May 26, 1987
Date

/s/
Foreperson of Jury

(2)

No. 88-109

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN PROTEIN CORPORATION,

Petitioner,

v.

AB VOLVO and VOLVO LASTVAGNAR AB,
as Successors in Interest to Beijerinvest AB,
BEIJER INDUSTRIES, INC. and BO LYCKE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

FREDERICK L. WHITMER*
DINAH H. BOURNE
BETSY L. WEISS
PITNEY, HARDIN, KIPP & SZUCH
Attorneys for Respondents
163 Madison Avenue
Morristown, New Jersey 07960
(201) 267-3333

**Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE:

WHERE THE DISTRICT COURT RESERVED DECISION ON THE DIRECTED VERDICT MOTIONS MADE AFTER THE PETITIONER'S CASE, RULING ONLY AFTER THE CLOSE OF ALL THE EVIDENCE, AND WHERE PETITIONER DID NOT, AND HAS NOT SAID THAT IT COULD HAVE PRESENTED ADDITIONAL EVIDENCE TO COMPENSATE FOR DEFICIENCIES IN ITS PROOF, WAS THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECT IN CONSIDERING RESPONDENTS' APPEAL ON THE MERITS OF THE DENIAL OF THEIR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT IN THE DISTRICT COURT.

QUESTION TWO:

DID THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY APPLY WELL SETTLED NEW YORK LAW TO DETERMINE THE CORRECTNESS OF THE DISTRICT COURT'S RULINGS.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner American Protein Corporation and the respondents AB Volvo and Volvo Lastvagnar AB as successors in interest to Beijerinvest AB and Beijer Industries, Inc. and an individual, Bo Lycke.

Respondent AB Volvo has no parent company. AB Volvo has no subsidiaries which are publicly traded corporations in the United States.

Respondent Volvo Lastvagnar AB's parent company is AB Volvo. Volvo Lastvagnar AB has no subsidiaries which are publicly traded corporations in the United States.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents AB Volvo ("Volvo") and Volvo Lastvagnar AB ("Lastvagnar") respectfully urge that this Court deny the petition of American Protein Corporation ("American Protein") for a writ of certiorari to review the decision of the Court of Appeals, reported at 844 F.2d 56 (2nd Cir. 1988), and reprinted in the appendix to American Protein's petition for writ of certiorari (hereinafter "Petitioner's Appendix") at A.1-18.

STATEMENT OF THE CASE

The United States District Court for the Southern District of New York, sitting in diversity, commenced the jury trial of the within action on May 20, 1987. At the close of petitioner's case all respondents made motions for directed verdicts on all counts. The Court reserved decision on the motions until the close of all the evidence. At the close of all the evidence, the District Court dismissed several counts and sent the remaining counts to the jury.

After the jury returned verdicts against respondents, respondents made post-judgment motions for judgment notwithstanding the verdict or, in the alternative, for a new trial on the grounds raised in their earlier directed verdict motions. Petitioner challenged respondents' right under Rule 50(b) of the Federal Rules of Civil Procedure to make these motions. The District Court heard the motions on the merits and denied them.

The Court of Appeals found that there was no defect in the preservation of respondents' right to make post-judgment motions, considered the appeal on the merits and entered judgment notwithstanding the motion. The Court of Appeals noted, in part, that the District Court believed that all necessary motions had been made and renewed. Further, the Court of Appeals held that renewal would have been "a pointless formality" where the trial judge had reserved decision on the directed verdict motions, finding that nothing in respondents' case strengthened petitioner's position and "[m]ore importantly, American Protein claimed neither that it would have nor that it could have presented any additional evidence to compensate for deficiencies in its proof." Petitioner's Appendix at A.13.

Petitioner now seeks review of the decision by the Court of Appeals.

REASONS FOR DENYING THE WRIT

1. There is no conflict among the circuits in decisions applying Rule 50(b).

The chief claim made by the petitioner to urge this Court's grant of a writ of certiorari is that there now exists a conflict in the circuits regarding application of Rule 50(b). Petition for Writ of Certiorari (hereinafter "Petition") at 10-20. In putative support of that claim, petitioner speculates that the Ninth Circuit would have reached a result contrary to that here. Petition at 10. Neither of petitioner's arguments has merit. In *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*, 786 F.2d 1342 (9th Cir. 1985), the case touted by the petitioner as compelling a result contrary to that here, the Court of Appeals for the Ninth Circuit cites with approval *Ebker v. Tan Jay International, Ltd.*, 739 F.2d 812 (2nd Cir. 1984), the very authority relied on below to award respondents judgment.

Both *Farley* and *Ebker* hold that there is no need to renew a directed verdict motion at the close of all the evidence when the trial court reserves decision on the directed verdict motion or where defendant could not reasonably believe in light of the proof introduced that it need do nothing to be free of the risk of a judgment notwithstanding the verdict. 786 F.2d at 1346; 739 F.2d at 823-24. Both circuits thus construe Rule 50(b) consistently. There is accordingly no conflict among the circuits in the construction of Rule 50(b) warranting any clarification of Rule 50(b) standards by this Court. In *Farley* the Ninth Circuit found that the defendant did *not* fall under either *Ebker* exception; here the Court of Appeals for the Second Circuit found that respondents *had* satisfied the standards for Rule 50(b). That the Court of Appeals for the Second Circuit applied the same law to the specific facts of this case to reach its judgment is likewise no reason for this Court's review.

Both *Ebker* and *Farley*, moreover, accord completely with holdings elsewhere. *See Bayamon Thom McAn, Inc. v. Miranda*, 409 F.2d 968, 971-72 (1st Cir. 1969); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 587 (2nd Cir. 1987); *Bohrer v. Hanes Corp.*, 715 F.2d 213, 217 (5th Cir. 1983), *cert.*

denied, 465 U.S. 1026 (1984); *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021, 1024-25 (5th Cir. 1987), *reh. denied*, 820 F.2d 1223 (5th Cir. 1987); *Morgan v. Raymond Corp.*, 484 F.2d 1008, 1010-14 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 575-577 (7th Cir. 1976); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Armstrong v. Federal National Mortgage Association*, 796 F.2d 366, 370 (10th Cir. 1986); *Trujillo v. Goodman*, 825 F.2d 1453, 1455-56 (10th Cir. 1987). The "conflict" among the circuits which petitioner urges on this Court simply does not exist. There is thus no need for this Court to issue its extraordinary writ.

2. There is no substantial issue for the Court to decide.

The District Court had jurisdiction over this matter by virtue of diversity jurisdiction. In resolving the merits of the claim under New York law that AB Volvo had tortiously interfered with petitioner's contractual relations, the Court of Appeals applied the authority of the highest court of the State of New York on the issue. Petitioner's Appendix at A.15-16. In *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y. 2d 682 (1969), the New York Court of Appeals held that in order to prove interference with contract a plaintiff has the burden, as part of its case in chief, to show no justification for the alleged interference. In *Felsen*, as here, the court held that a parent corporation has a common economic interest with its subsidiary and that a plaintiff needed to show malice as part of its prima facie case. Petitioner disagrees with *Felsen* and with the application of *Felsen* below.

This hardly rises to a substantial issue worthy of this Court's judgment. The worst that can be said of the decision below is that it misconstrues prevailing state law. Petitioner's hysterical claim that the Court of Appeals has somehow infringed petitioner's jury trial right by applying state law amounts to no constitutional deprivation; the result is the ordinary process of judging.

When all is said and done, this petition raises no issue worthy of this Court's certiorari jurisdiction.

CONCLUSION

For all these reasons, respondents urge that American Protein's petition for a writ of certiorari be denied.

Respectfully submitted,

FREDERICK L. WHITMER
PITNEY, HARDIN, KIPP & SZUCH
163 Madison Avenue
Morristown, NJ 07960
(201) 267-3333

Counsel for Respondents

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT L. BEERMAN*
BEERMAN & WADLER
Attorneys for Petitioner
122 East 42nd Street, Suite 1910
New York, New York 10168
(212) 490-6600

Counsel of Record

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AMERICAN PROTEIN CORPORATION,

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- against -

AB VOLVO and VOLVO LASTVAGNAR AB,
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Beijerinvest AB,
BEIJER INDUSTRIES, INC. and BO LYCKE,

Respondents.

PETITIONER'S REPLY BRIEF

This reply brief is necessitated by the factually incorrect statement relied upon by the respondents in claiming that there is no conflict among the circuits in applying Rule 50(b).

As pointed out in the petition (p.12,fn.8), all courts agree that the formality of a Rule 50(b) motion is

unnecessary where the trial court has reserved decision on an earlier motion for a directed verdict made at the close of plaintiff's case awaiting the close of all evidence. To require the renewal of the motion under such circumstances is a procedural technicality which does not serve the underlying purposes of Rule 50(b).

Respondents' statement that decision on the motion was reserved here is incorrect (opposing brief pp. 2-4). As indicated in the petition (p.5), at the close of petitioner's case (not at the close of all evidence) the trial judge ruled that there was sufficient evidence to go to the jury on the issue of tortious interference, petitioner's main claim. As indicated by the record at the close of petitioner's case, respondents moved for a directed verdict on all claims. The trial court held:

> The cause of action of tortious interference with the contract, I deny your motion. This gentleman came over from Sweden and they met in the Sherry Netherlands Hotel at 8 a.m. and in one moment they voted themselves walking around money, I think $15,000 apiece, in next half hour or next ten minutes or whenever it was they voted to wind down the business. Was this the act of Volvo or was this an independent act of the Invest? That's the question.... I may be a hundred percent wrong but I don't think so. I am going to reserve ruling on first, second, third and fourth, those are things that took place long before Volvo got into the act.... But the tortious interference with the contract I think at this point is a serious question for the jury. You may not, but I do. (Joint Appendix pp. 316-317).

The review sought by the petitioner refers only to the tortious interference claim. "The central issue before this Court is the permissable scope of review with respect to the tortious interference claim" (petition p. 6).

To misstate the facts in order to

avoid addressing the issues and the conflict among the circuits serves no useful purpose. I respectfully refer the Court to the petition on this point (Point I, pp. 10-20).

Significantly, the opposing brief also fails to address the substantive errors made by the Second Circuit in reversing a 3 million dollar jury verdict. To only say that there is "no issue worthy of this Court's certiorari jurisdiction" begs the issue (opposing brief p.4). Again, I respectfully refer this Court to the petition on this point (Point II, pp. 21-25).

CONCLUSION

Had this case been tried in the home district of the trial judge, an appeal to the Ninth Circuit would have been summarily affirmed for lack of compliance with Rule 50(b). In marked contrast, the Second Circuit reversed.

The irony of this result underscores the manifest need for uniform application of Rule 50(b) in all the circuits. For this compelling reason, certiorari should be granted.

New York, New York
September 16, 1988

Respectfully submitted,

ROBERT L. BEERMAN
BEERMAN & WADLER
Attorneys for petitioner
122 East 42nd Street,
Suite 1910
New York, New York 10168
(212) 490-6600